Diese Website verwendet Cookies von Google, um Dienste anzubieten und den Traffic zu analysieren. Deine IP-Adresse und dein User-Agent werden zusammen mit Messwerten zur Leistung und Sicherheit für Google freigegeben. So können Nutzungsstatistiken generiert, Missbrauchsfälle erkannt und behoben und die Qualität des Dienstes gewährleistet werden.

WEITERE INFORMATIONEN OK

Sunday, October 16, 2005

Common law rights

The recognition of common law rights that could trump legislative statute and royal edict had already long been recognized in England by the time of *Bonham's Case* in 1610:

> ...it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.

In the United States, Supreme Court recognition of unenumerated rights has been the norm since shortly after our Constitution was ratified, except for the short "footnote four" period during the pathological New Deal Court. Four heroic justices fought against the stripping of "mere economic" property and contract rights, and illegal expansion of federal powers, undertaken during the New Deal.

Unfortuneately (in hindsight, given the later replacement of natural law philosophy and demotion of common law to statutory law) rather than invoking the Ninth Amendment, unenumerated rights were at first justified by the Court as a matter of natural rights. In *Calder v. Bull* (1798) Justice Chase, voting with a unanimous Court, wrote:

> There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles, in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law), contrary to the great first principles of the socical compact, cannot be considered a rightful exercise of the legislative authority.

In the later legal positivist era they were classified as substantive liberties under the Due Process Clause.

Infamies such as *Korematsu* occurred soon after the New Deal Court rejected the idea of unenumerated rights. This absolutist approach was itself effectively rejected when *Griswold* found an unenumerated right of privacy implied by the "penumbras" and "emanations" of the enumerated Bill of Rights. The right of privacy was later classified as a substantive liberty under the Due Process Clause.

About Me

Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

"Szabo comes out with these essays that leave me in awe." -- Brian Dunbar

"Reading material that is eclectic, challenging and endlessly fascinating." -- Sean McGrath, Propylon

"Like most blogs worth my attention, this blog is updated only infrequently. That is because the authors of blogs worth my attention only post when they have something to say that is true, relevant and not already known by their audience. Most of the human race does not have the skill to know when an idea has these three properties. The skill is particularly rare in the fields of politics and economics, which is why this blog is such a rare and valuable thing." -- Richard Hollerith

View my complete profile

Posted by Nick Szabo at 6:26 AM

4 comments:

George Thompson said...

Justice Thomas, among some others, believe that unenumerated rights are incorporated under the Privileges and Immunities Clause of the 14th Amendment.

5:18 AM

Serveto said...

George:

Justice Thomas is only one vote. And the post Civil War Slaughterhouse Cases effectively strangled the Privileges and Immunities Clause as a source of unenumerated rights. Tragic, really...

4:03 AM

Serveto said...

Unenumerated Rights Vs. the Commerce Clause:

If you're an ardent believer of enumerated rights--a limited central government with only certain powers and functions, the remaining powers and functions being rights belonging to the people--then the biggest problem lingering from 20th century jurisprudence seems to be the expansive view of the Commerce Clause.

The Commerce Clause essentially allows Congress to legislate in any area that affects interstate commerce. However, according to a broad economic perspective, almost anything can affect interstate commerce. Hence, Congress can legislate ib any area it chooses.

Thus, if Congress can legislate anything, how do you determine when it's gone too far? How do you determine when its impeded on too many unenumerated rights?

The challenge of 21st century jurisprudence is to find that balance.

4:11 AM

Anonymous said...

Would signing an instrument "Without Prejudice" along with a signature reserve one's Common Law rights?

8:39 AM

Post a Comment

Newer Post Home Older Post

Blog Archive

- ► 2018 (1)
- ► 2017 (3)
- ► 2016 (4)
- ► 2015 (3)
- ► 2014 (3)
- ► 2013 (3)
- ► 2012 (8)
- ► 2011 (12)
- ► 2010 (9)
- ► 2009 (29)
- ► 2008 (55)
- ► 2007 (47)
- ► 2006 (130)
- ▼ 2005 (44)
  - ► December (16)
  - ► November (5)
  - ▼ October (23)
    - Software patents paper
    - Supreme Court takes patentable subject matter case...
    - Automobile privacy
    - Are intellectual property rights natural?
    - Civil liberties in the forever war
    - Negative rights and the United States Constitution...
    - Patent law reform in the U.S.
    - Janice Rogers Brown
    - Blackberry e-mail injunction
    - Anti-phishing bills and "unauthorized access"
    - Patents and borders
    - A world of vouchers
    - New writing -- The Birth of Insurance
    - Manual of Patent Examining

Subscribe to: Post Comments (Atom)

Procedure (MPEP)

Surveillance and technological "neutrality"

Cuthbert: "unauthorized access"

Information, randomness, and cryptography

Rights of travel

Some common and natural law rights of parenthood

Common law rights

Unenumerated

A Measure of Sacrifice

Shelling Out -- The Origins of Money

Simple theme. Powered by Blogger.